Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

PAULINE KOZIARA, and
KATHLEEN DeRIENZO,

Petitioners,

vs.

SEMINOLE COUNTY, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari
To The Florida Fifth District Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the Florida appellate court's decision upholding Seminole County's "Public Decency Ordinance" stand even though the trial court found that the ordinance was not supported by evidence of adverse secondary effects under *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002)?

2. Can the bathing suit requirement Seminole County imposes upon exotic dancers stand under the fourth prong of *United States v. O'Brien*, 391 U.S. 367 (1968), in light of *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) and *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003), *cert. denied*, 124 S.Ct. 2016 (2004)?

PARTIES TO THE PROCEEDING

The parties listed in the caption are the only parties to the proceeding, specifically Seminole County, Florida and Pauline Koziara and Kathleen DeRienzo – adult nightclub exotic dancers.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully request this Court to issue a writ of certiorari to review the decision of the Florida Fifth District Court of Appeal entered in this case.

OPINIONS BELOW

The per curium decision of the Florida Fifth District Court of Appeal is reported as *Koziara v. Seminole,* 873 So.2d 374 (Fla. 5th DCA 2004), App. A. The trial court's order is reported as *McKee v. Casselberry,*[1] 10 Fla.L.Weekly Supp. 408a (Fla. 18th Jud. Cir. 2003), App. B. The appellate court denied rehearing on May 7, 2004, App. D.

STATEMENT OF JURISDICTION

The decision of the Court of Appeal was entered on March 30, 2004, with rehearing denied on May 7, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case addresses the First, Fifth and Fourteenth Amendments to the United States Constitution.

[1] The challenge to Seminole County's Public Decency ordinance was tried in conjunction with *McKee v. Casselberry,* a challenge to Casselberry's Public Nudity ordinance. These two ordinances overlap in large respect.

STATEMENT OF THE CASE

A. FACTS AND PROCEDURE

1. "Harpers and bawds and women selling cake."

This case was tried under the procedure outlined in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002). After a six-day trial, the trial judge, O.H. Eaton, Jr., entered judgment in favor of Seminole County.[2] This case garnered a great deal of media attention and there is an element of wry humor in Judge Eaton's orders. Much of the "ta do" focused upon the play "Les Femmes Fatale" commissioned by Club Juana. This play involved several scenes of nudity, including the "witches scene" from *Macbeth*. Media outlets as diverse as Home Box Office, the British Broadcasting Company and Public Broadcasting Service covered same.

After hiring playwright Morris Sullivan to author the script, notice was sent to local law enforcement agencies informing them that the play would be performed at Club Juana, an adult nightclub located in Seminole County.[3] This was of special concern to the authorities because nudity had been banned by Casselberry and Seminole County, **App. E.** To insure that there was no dispute as to the nature of the performance, local officials were invited to videotape it. At least two videotapes of the performances (as well as the script, play bill, etc.) were moved into evidence.

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[2] A petition has also been filed in a companion case, *McKee v. Casselberry*.

[3] Club Juana has been in existence since the 1960's.

Ultimately, all three actors, including Christy McKee, as well as Michael Pinter, Jr., the owner of Club Juana, were arrested under Casselberry's ordinance. A challenge was brought against both the city and county ordinances.[4] The matter was (initially) addressed by the trial court on the plaintiffs' motion for temporary injunction. See **App. C.**

> Double, double, toil and trouble;
> Fire burn and cauldron bubble;
>
> On the night of the performance of *Les Femmes Fatale*, law enforcement agents were present and filmed the production. The film is in evidence and the court has viewed it. Broadway quality it is not, but the performance is not "adult entertainment" (nude dancing) as much as it is "entertainment for adults." While reasonable persons may disagree with the quality of the performance, it contains the elements Mr. Sullivan testified it contained – political parody and satire – elements which are in the best of American traditions. Americans have been free to jab and poke fun at their government ever since King George was ousted from our shores and they must continue to be free to do so, even at the Club Juana. The performance falls within the exemption contained in the county ordinance because "it constitutes a part of a bonafide live communication, demonstration or performance by a person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of

[4] Ms. Koziara and Ms. DeRienzo also contend, among other things, that Seminole County's exemption for *bonafide* nude performances makes the ordinance content-based and that the "*bonafide performance*" exemption is unconstitutionally vague.

> a genuine message or public expression and is not a mere guise or pretense utilized to exploit the conduct of being nude for profit or commercial gain."

McKee v. City of Casselberry, 7 Fla.L.Weekly Supp. 208a (Fla. 18th Jud. Cir. 1999), **App. D**, (temporary injunction order).

After the court denied the parties' respective motions for summary judgment,[5] the case proceeded to trial. *McKee v. Casselberry*, 9 Fla.L.Weekly Supp. 317b (Fla. 18th Jud. Cir. 2002). After a six-day trial the court upheld both ordinances (county and city) finding that even though the city failed to present credible evidence supporting its ordinance, Casselberry's law could stand because other cities in the central Florida community banned nudity. As a post-script of sorts, the court found that the preamble to the Seminole County Decency ordinance was sufficient to uphold it – despite evidentiary findings to the contrary. This is obviously completely contrary to *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002) and *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (discussion of the four part *O'Brien* test).

From a factual perspective, a good starting place is to discuss the passage of Seminole County's Public Decency ordinance – which is actually an anti-nude dancing ordinance.[6] See **App. E.** After the Seminole County Commission **repeatedly rejected** it, the ordinance was passed by the electorate – after a petition drive initiated by a political

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[5] Partial judgment was entered on the first prong of *United States v. O'Brien*, 391 U.S. 367 (1968) test, which was not a disputed issue.

[6] The ordinance contains several references to erotic dancing.

action committee known as Seminole County Citizens for Public Decency.

The proposed ordinance first came before the county commission on June 10, 1997 but the item was moved to June 24 and again to July 22 (R3/446-456). On July 22 commissioner Adams made a motion to set the item aside to allow staff three months to present an alternative ordinance (R3/455-476).

On October 13, 1997, additional discussion was held. The sheriff stated he was comfortable with the law already in place with the exception that it did not address hot dog vendors. Commissioner McLain said he did not believe it was necessary to create another ordinance and Commissioner Adams concurred.[7] Therefore, "[t]he majority consensus of the board was **not** to move forward with the public nudity ordinance" (R7/1104).[8]

The issue was raised again on July 14, 1998 in response to a petition drive to have the ordinance placed on the ballot. The Supervisor of Elections directed the county to certify the petitions relative to the adoption of the ordinance. Under the county charter, a public hearing had to be held within sixty days to consider adoption. If the board did not approve the ordinance, it would be subject to a binding referendum (R3/477-478).

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[7] The public nudity debate actually came to life after the local sheriff sought additional laws to address the body scrub businesses in the county (R7/1096-1104). It became a political debate and snowballed from there.

[8] All emphasis has been added in this petition unless otherwise noted.

The commission continued the discussion to August 11 to allow for more public participation (R3/477-478). At the August 11 meeting it was explained that the ordinance had been initiated by the PAC Seminole County Citizens for Decency and Frederick Nelson and Pastor Mark George would make a presentation. Both Mr. Nelson and Mr. George spoke in favor of the ordinance. The Seminole County Sheriff stated that he would prefer the Orange County ordinance – a less restrictive measure.[9] After hearing positions both pro and con, two commissioners voted for and three voted against the ordinance. The county attorney explained that the commission had to place the ordinance on the ballot or be in violation of the county charter. Thus, the ordinance was placed on the November 1998 ballot (R3/479-494).

The issue was brought up again on the commission's agenda on September 22, 1998. This meeting dealt with a lawsuit which was filed against the Supervisor of Elections challenging the petition drive. At that time, Pastor George stated, " . . . the referendum ordinance will be placed on the November 3 ballot due to the fact the board failed to enact the ordinance" (R4/497). To forestall the election lawsuit issues, the county attorney recommended that the commission enact the ordinance (R4/500). Once again, **the commission voted it down** (R4/502).

A short paragraph explaining the Seminole County Public Decency ordinance appeared on the ballot. Voters were asked to vote yes or no for public decency (R7/1064).

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[9] Orange County, Florida's ordinance imposes a G-string requirement rather than a bathing suit requirement. It appears in the record at R6/918-930.

The ordinance passed via binding referendum and on November 10, 1998, the Seminole County Commission was required to approve it. After that, dancers at Club Juana, etc. were required to wear "bathing suits" (R4/506-507).

Despite the fact that the Seminole County Commission rejected the ordinance, the attorney for the county, specifically the American Liberties Institute, argued that the ordinance could be upheld based upon a claim of adverse secondary effects.[10] This evidence was weak and was rejected. Not only was this "evidence" not part of the legislative record underlying the ordinance but further, and of equal importance, it was rejected by the trial judge.

For instance, testimony was presented that a "decoy prostitute"[11] was positioned on the highway near Club Juana to determine how many times she would be propositioned. Later, for comparison purposes, she was relocated to the entrance of a residential neighborhood. The following is the court's assessment of this evidence.

> Some of the testimony revealed anecdotal, rather than scientific studies. A lieutenant from the Seminole County Sheriff's Department testified that he was in charge of an exercise in which a female deputy posed as a prostitute and stood near the intersection of highway 17-92 and highway 436 in the city. The intersection of those two highways is one of the busiest in the state of

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[10] There was no legislative record which could be construed in favor of the ordinance because the local legislative body rejected it. Rather, this ordinance was passed at the ballot box.

[11] This was not a law enforcement exercise. There was no intention of arresting anyone.

> Florida and is near the location of the Club Juana. Not surprisingly, the female deputy was attracting more than passing attention from some of the motorists driving by. Then she moved some distance down highway 17-92 to the entrance of a residential subdivision and, after an hour, she only attracted the city police, who received a complaint from one of the neighborhood residents about her presence.
>
> It was admitted this exercise was not scientific and the court gives no credibility to it for proof that the Club Juana or any other adult club in the area produces adverse secondary effects. Prostitution, after all, has been around for thousands of years and is not caused by adult clubs any more than it is caused by hotels or Internet websites.

App. B.

The county also adopted the testimony of the city's expert, a professor from the University of Washington. The trial judge emphatically rejected his testimony.

> William Henry George, Ph.D., a clinical psychologist and associate professor as well as the director of ethnic studies in the United States and the principal investigator for research of alcohol's effects on sexual arousal at the University of Washington, testified as an expert on behalf of the city.
>
> * * *
>
> Boiled down to its basics, Dr. George's "scientific experiments" include the use of volunteer college students of both sexes who were invited to drink alcohol and view erotic material. Sometimes the material was more erotic than others. Sometimes

> the material was pornographic. While Dr. George did not explain the brand or brands of alcohol he used in the experiments to any great degree it is apparent that his student volunteers were satisfied because they drank a lot of it.

App. B.

* * *

> It is disappointing to realize that the federal government has wasted the tax payers' money on this ridiculous research. If Dr. George truly takes himself seriously, then perhaps he should, like the Emperor in the tale by Hans Christian Anderson, check to see if his science is clothing or in his imagination.

App. B at n. 2.

In contrast, the plaintiffs presented the testimony of Dr. Terry Danner who outlined, among other things, that there was more crime at the local Wal-Mart and the local high schools than at the Seminole County adult clubs. This testimony was accepted by the court.

> In order to discredit the defendants' evidence, the plaintiffs called Dr. Terry Danner as a witness. He is a criminologist who chairs the Department of Criminal Justice at Saint Leo University. He specializes in analyzing the effects crime causes on economic activity. He challenged the theory that nude striptease dancing causes adverse secondary effects whether alcohol is served or not. He opined that "place management" is a "powerful variable" that effects whether or not crime occurs at any given establishment. **His testimony casts more doubt** upon the findings contained in the city of Casselberry's ordinance and the information the city relied upon and suggests that

> proper management is the key to successful adult club operations.

App. B.

Ms. Koziara and Ms. DeRienzo (adult dancers in the community) also presented the testimony of an anthropologist, Dr. Judith Hanna, to challenge Seminole County's requirement that exotic dancers wear bathing suits (as opposed to g-strings, etc.). This testimony was likewise accepted by the trial judge.

> The testimony of one final witness needs to be discussed. The plaintiffs called an anthropologist, Dr. Judith Lynn Hannah [sic], as an expert in dance as a nonverbal communication. She traced the history of the striptease and in describing exotic dance stated, "it's adult entertainment and it is supposed to be somewhat naughty and somewhat risque and you're supposed to see more flesh than you would see elsewhere." Transcript, Page 357. Since the clothing requirements of the ordinances in question here forbid nudity completely (Dr. Hannah [sic] noted that more clothing is required than is seen at swimming pools and on the beaches) **she testified that the nature of the striptease is destroyed. That testimony is accepted as true**.

App. B.

Obviously over the course of a six-day trial there was a great deal of testimony presented – which was extensively outlined in the briefs filed with the state appellate court. However, at this juncture, suffice it to say that the trial judge accepted the plaintiffs' witnesses and rejected the county's. That is abundantly clear by reading the court's order, **App. B.**

An additional point is worth noting. As part of its preparation, the plaintiffs hired two experts, Dr. Randy Fisher and Richard Schauseil, who authored a number of studies addressing both residential and commercial property values as well as commerce in the local community. These reports were multi-volume and relied upon public record documentation.

Faced with these dispositive reports, Seminole County stipulated that its ordinance was **not** premised upon any claim of adverse secondary effects based upon property values. The plaintiffs did not wish to accept this stipulation, but in light of the concession, the trial judge ruled that he need not hear (as a matter of relevance) from these additional experts.[12]

As alluded to above, the plaintiffs also presented the testimony of Dr. Danner from Saint Leo University. His testimony was extensive and overwhelming that the nightclubs in Seminole County[13] did not cause adverse secondary effects. For instance, Dr. Danner reviewed data from the Florida Department of Law Enforcement from 1971 to 1998 (prior to the ordinance) and found that three cities in Seminole County with the highest rates of index crime had **no** adult entertainment. He also prepared a graph based upon a collection of police service call data which involved a comparison of adult nightclubs in Seminole County with non-adult entertainment venues. The local mall and the Wal-Mart were at the top of the list with the most service calls. The local "Denny's" had more criminal activity than the adult nightclubs – even though

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[12] However, the studies were made part of the record.

[13] There are four adult nightclubs.

Denny's is less than half the size of Club Juana and another Casselberry nightclub, Rachel's. Dr. Danner could not evaluate any theory advanced in the legislative record which would support Seminole County's Ordinance because the ordinance was rejected by the county commission. The enactment of the ordinance could not be evaluated under a secondary effects standard because it was passed during an election, based upon the individual caprice of the electorate – voters were asked to vote for or against public decency. Again, his testimony was accepted by the trial judge, ("casting more doubt . . . ," **App. B**). Perhaps of greater significance, Dr. Danner[14] found that crime in Casselberry (where three of the Seminole County clubs are located) actually rose after the passage of the ordinance.

Because this case was tried in conjunction with Casselberry's Ordinance (which adopted in large part Seminole County's ordinance), the trial judge determined that the city ordinance could be upheld simply because city officials wanted to conform its nudity laws with surrounding communities – a political rather than secondary effects determination.

> **Conforming**[15] the city of Casselberry's ordinance regulating nudity to the other surrounding cities is a valid exercise of the city's police power and no further inquiry into the city's motivation need

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[14] Dr. Danner's testimony was voluminous addressing national studies, Florida studies, local analysis of a variety of data, rape statistics, etc.

[15] The *Alameda Books* standard would be completely unnecessary if Los Angeles only need argue that because Sacramento banned "X," Los Angeles could follow suit. Certainly, this would be an easy way to eliminate adult entertainment once and for all.

be made. The testimony of Mr. Schluckebier is convincing and it is accepted.

App. B.

Then, after rejecting the city and county's evidence and finding that Casselberry's Ordinance could be upheld based upon uniformity with other municipalities, the court went on to find (as more of an afterthought) that Seminole County's Ordinance could be upheld based upon its preamble.[16] But again, this is completely contrary to the standard established in *Alameda Books*. Once the court evaluated the county's evidence and found that the plaintiff had sufficiently cast doubt on it, as a matter of law it would be impossible to uphold the ordinance simply by looking to its preamble. That is why the parties spent six days presenting evidence on the subject. Further, it cannot be highlighted enough that the basis for the passage of the ordinance (the preamble, etc.) was rejected by the county commission.

On appeal, the petitioners argued that the trial court's decision was contrary to *Alameda Books*, *Pap's* and *Peek-a-Boo*. The appellate court affirmed, citing *Café 207, Inc. v. St. Johns County*, 66 F.3d 272 (11th Cir. 1995). On rehearing, Ms. Koziara pointed out that *Café 207* was nullified by *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003) and this court's decision in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). This Court has never upheld a bathing suit requirement. There has to be a limit

[16] The court made this finding after stating that the plaintiffs truly would not be successful unless they could invalidate Casselberry's ordinance. From the court's perspective, its determination on Casselberry's ordinance thus affected its decision on Seminole County's.

on clothing requirements under *O'Brien*. See **App. E** for a specific description of Seminole County's clothing requirements.

REASONS FOR GRANTING THE WRIT

POINT ONE

The Florida appellate court erred in upholding Seminole County's Public Decency Ordinance in light of the trial court's finding that the ordinance was not supported by evidence of adverse secondary effects as required by *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002).

This case was tried under the procedure outlined in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002) and focused upon the multi-part test outlined in *United States v. O'Brien*, 391 U.S. 367 (1968), which consists of four independent prongs:

1. Whether the ordinance is within the constitutional power of Seminole County to enact;

2. Whether the ordinance furthers a substantial governmental interest;

3. Whether the ordinance is unrelated to the suppression of free expression; and

4. Whether the ordinance restricts First Amendment freedoms no greater than necessary to further the government's interest.

City of Erie v. Pap's A.M., 529 U.S. 277 (2000); *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003),

cert. denied, 124 S.Ct. 2016 (2004); *Flannigan's v. Fulton County*, 242 F.3d 976, 984-986 (11th Cir. 2001).

Prong two of the test, which is the focus of this point, hinges upon whether the county was able to prove that the adult nightclubs cause adverse secondary effects such as higher crime rates and lower property values.[17] If the county could not meet its burden, the ordinance should have been stricken. *Flannigan's, supra,* (ordinance invalidated where police department study called into question secondary effects premise); *Krueger v. City of Pensacola*, 759 F.2d 851, 855 (11th Cir. 1985) (ordinance invalidated where evidence lacking to support assertion); *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985) (no evidence other than statements in ordinance); *Mann Enterprises, Inc. v. Pasco County*, 2001 U.S. Dist. Lexis 23735 (M.D. FL 2001) (evidence showed comparatively minimal secondary effects); *XLT Corporation v. County of Lake*, 743 N.E.2d 162 (IL. App. Ct. 2000) (preamble insufficient); *Erie Boulevard Triangle Corp. v. City of Schenectady*, 152 F.Supp.2d 241 (N.D. NY 2001).

More recently, this Court explained that the government's evidence must be real and concrete in nature.

> **This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance.** If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its

[17] The government always has the burden when First Amendment freedoms are at issue. *United States v. Playboy Entertainment*, 529 U.S. 808, 816-817 (2000).

> rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standards set forth in *Renton*. (Citation omitted). If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to support the record with evidence renewing support for a theory that justifies its ordinance.

City of Los Angeles v. Alameda Books, 535 U.S. 425, 438-439 (2002). The county's evidence cannot be based upon speculation or conjecture. *Flannigan's* 242 F.3d at 986. Not only must the purported harms associated with nude dancing be real and not conjectural, Seminole County's ordinance must alleviate the harms (allegedly) associated with nude dancing in a material way. *Carandola v. Bason*, 303 F.3d 507, 515 (4th Cir. 2002); *J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 371-373 (5th Cir. 1998); *Phillips v. Borough of Keyport*, 107 F.3d 164, 173-175 (3rd Cir. 1997) (en banc).

Because Seminole County's ordinance lacked any evidence[18] supporting it, it should have been stricken. Of critical importance, the local sheriff was opposed to the ordinance and the commission repeatedly rejected all pleas to enact it. Therefore, it came to the appellate court lacking a legislative record approved by the local governing body. Instead, the ordinance was rejected – a crucial factor in the *Alameda Books* analysis.

Ordinances like this cannot be based purely upon political or moral beliefs. They must be supported by solid

[18] Neither the city nor the county attempted to argue that "nude theater," e.g., "Femmes Fatale" leads to adverse secondary affects.

evidence – evidence which is not flawed or based upon shoddy data. A review of Lt. Allen's testimony (addressed above at page eight) shows the flawed logic at work here. The materials discussed in his testimony were **not** used as a basis for the enactment of the "Decency" ordinance. They were presented in support of another ordinance – an entirely distinct matter. Besides, his testimony was rejected by the trial judge who found the prostitution decoy ruse unconvincing. It could not possibly meet a reasonableness or scientific standard. On this ground alone the appellate court's affirmance is flawed.

The trial court decided that if it was to uphold Casselberry's ordinance, it should also uphold Seminole County's – the court concluded that the plaintiffs must prevail on both to have any chance of practical success. However, that is hardly a reason to uphold Seminole County's ordinance.

After thoroughly detailing its findings that the plaintiffs' evidence was credible and the government's was not, the court appears to have run out of gas and simply stated that Seminole County's ordinance should be upheld based upon its preamble. However, when subjected to an evidentiary challenge, an ordinance such as this can never be upheld based upon its preamble. In other words, once the court determines that the plaintiffs' evidence casts doubt upon the government's, it is incumbent upon the government to rebut same with solid evidence to the contrary. This did not happen. There was no evidence on either front – "pre-enactment"[19] or otherwise. The truth is, the trial

[19] Absent pre-enactment evidence the ordinance was constitutionally flawed. This is a First Amendment requirement. See discussion in

(Continued on following page)

court upheld Seminole County's ordinance because it determined that Casselberry's ordinance was "constitutional" because government entities have the power to enact them as a matter of equity if other local municipalities prohibit nude entertainment. This is not a permissible reason to uphold a public nudity ordinance which infringes upon the First Amendment. Political reasoning is flawed reasoning when it comes to analyzing these types of ordinances.

Because the trial and appellate courts have turned *Alameda Books, Inc.* and *Pap's* on "their" heads, this Court should intervene and accept this case for review. Further, this case gives the Court a solid opportunity to address the *Alameda Books*' standard, not in a summary judgment vacuum, but rather after a multi-day trial on the merits.

POINT TWO

The bathing suit requirement Seminole County imposes upon exotic dancers cannot stand under the fourth prong of *United States v. O'Brien*, 391 U.S. 367 (1968), in light of *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) and *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003).

In order to pass muster, Seminole County's ordinance can only be upheld if it restricts erotic dancing no greater than necessary to further the government's interest in curbing the alleged "secondary effects" associated with nude dancing. *Peek-A-Boo Lounge v. Manatee County*, 337

Peek-A-Boo Lounge v. Manatee County, 337 F.3d 1251 (11th Cir. 2003), *cert. denied*, 124 S.Ct. 2016 (2004).

F.3d 1251 (11th Cir. 2003). This analysis can be reviewed in the following way. First, did the city offer evidence (much less credible evidence) that showed that requiring a dancer to wear a bathing suit will decrease crime, and are the clothing requirements tailored so that they are no greater than necessary to further this interest? Second, and of equal importance, do the clothing requirements attenuate or destroy the nature of adult dancing?

Justice O'Connor summed it up quite well when she stated:

> It also may be true that a pasties and G-string requirement would not be as effective as, for example, a requirement that the dancers be fully clothed, but the city must balance its efforts to address the problem with the requirement that the restriction be **no greater than necessary to further the city's interests**.

City of Erie v. Pap's A.M., 529 U.S. 277, 310 (2000).

More recently, this Court readdressed this requirement in *City of Los Angeles v. Alameda Books*, 533 U.S. 425 (2002). Justice Kennedy's concurring opinion is controlling because his decision constitutes the narrowest holding under *Marks v. United States*, 430 U.S. 188 (1977).

> At the outset, we must identify the claim a city must make in order to justify a content-based zoning ordinance. As discussed above, a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, **while leaving the quantity and accessibility of speech substantially intact**. The ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside. A city may not assert

> that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with Justice Souter. See post at 5. The rationale of the ordinance must be that it will suppress secondary effects – and not by suppressing speech.
>
> * * *
>
> As discussed, the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech.

Alameda Books at 449-450.

> * * *
>
> **It is no trick to reduce secondary effects by reducing speech or its audience**; but a city may not attack secondary effects indirectly by attacking speech.

Id. at 450.

More recently, in *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003), the Eleventh Circuit all but invalidated Manatee County's ordinance which, like Seminole County and Casselberry's, **requires dancers to wear bathing suits** rather than performing nude or in G-strings.

> The question we face is whether the county's prohibition, which presumably impacts the expressive component of erotic dancing, is no greater than essential to further the county's interest in preventing secondary effects. In *Pap's A.M.*, the court determined that this issue required the balancing of competing interests, and it concluded that a pasties and G-string requirement survived

> intermediate scrutiny because it "leaves ample capacity to convey the dancers' erotic message."

Peek-A-Boo at 1273.

* * *

> Nevertheless, we find it difficult to conclude on this record that preventing erotic dancers from wearing G-strings, thongs, pasties and the like has only a "de minimis" effect on the expressive component of erotic dancing or "leaves ample capacity to convey the dancers' erotic message." *Id.* On the contrary, because erotic dancers in Manatee County are not "free to perform wearing pasties and G-strings," *id.*, arguably, the county's prohibition could significantly impact that message.

Id. at 1274; *Lyndon v. Beyer*, 627 N.W.2d 548, 2001 Wisc.Ct.App. Lexis 265 (Wisc.Ct.App. 2001).

Therefore, in terms of the record at issue, four points must be considered. First, the county offered no justification for choosing a bathing suit requirement rather than a G-string clothing requirement. Second, neither the city nor the county attempted, much less offered, any evidence that requiring a dancer to wear a bathing suit will reduce "adverse secondary effects" and that that requirement is the least restrictive means to achieve its goal. Third, Dr. Hanna's testimony was unchallenged and unrebutted – requiring a striptease dancer to wear a bathing suit destroys the nature of adult dancing at businesses like Club Juana. Fourth and finally, it cannot be emphasized enough that the trial judge accepted Dr. Hanna's testimony as true.

> The testimony of one final witness needs to be discussed. The plaintiffs called an anthropologist, Dr. Judith Lynn Hannah [sic], as an expert in dance as a nonverbal communication. She traced the history of the striptease and in describing exotic dance stated, "it's adult entertainment and it is supposed to be somewhat naughty and somewhat risque and you're supposed to see more flesh than you would see elsewhere." Transcript, Page 357. Since the clothing requirements of the ordinances in question here forbid nudity completely (Dr. Hannah [sic] noted that more clothing is required than is seen at swimming pools and on the beaches) she testified that the nature of the striptease is destroyed. **That testimony is accepted as true.**

App. B.

The trial judge got the facts right but the law wrong. For whatever reason, both he and the appellate court misunderstood the nature of the fourth prong of *United States v. O'Brien*, 391 U.S. 367 (1968).

This Court should accept this case for two principal reasons. The first is the conflict with *Pap's* and *Alameda Books*, and the second is because it gives the court an opportunity to address once and for all, that there is a limit to public nudity ordinances. Local governments cannot continually increase the clothing requirements, thus destroying these businesses and the entertainment known as "striptease." There must be limitations under the First Amendment – otherwise this court's edict that erotic dancing is protected by the First Amendment becomes a charade.

CONCLUSION

Based upon the foregoing, the Petitioners request that this Court grant their petition.

Respectfully submitted this 5th day of August, 2004.

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APPENDIX A

PAULINE KOZIARA AND KATHLEEN DERIENZO, Appellant, v. SEMINOLE COUNTY, FLORIDA, Appellee.

Case No. 5D03-1743

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

873 So. 2d 374; 2004 Fla. App. LEXIS 4682

March 30, 2004, Opinion Filed

NOTICE: DECISION WITHOUT PUBLISHED OPINION

SUBSEQUENT HISTORY: Rehearing denied by *Koziara v. Seminole County*, 2004 Fla. App. LEXIS 7797 (Fla. Dist. Ct. App. 5th Dist., May 7, 2004)

PRIOR HISTORY: Appeal from the Circuit Court for Seminole County, O. H. Eaton, Jr., Judge.

COUNSEL: Steven G. Mason of Steven G. Mason, P. A., Orlando, for Appellant.

Frederick H. Nelson of American Liberties Institute, Orlando, for Appellee.

JUDGES: PLEUS, PALMER and ORFINGER, JJ., concur.

OPINION: PER CURIAM.

AFFIRMED. See *Cafe 207, Inc. v. St. Johns County, 66 F.3d 272 (11th Cir. 1995).*

PLEUS, PALMER and ORFINGER, JJ., concur.

APPENDIX B

CHRISTY McKEE et al., Plaintiffs, v.
CITY OF CASSELBERRY, FLORIDA, Defendant.

Circuit Court, 18th Judicial Circuit Seminole County,

PAULINE KOZIARA et al., Plaintiffs, v.
SEMINOLE COUNTY, FLORIDA, etc., Defendant.

Case Nos. 99-CA-1430-16-E, 99-CA-511-16-E.

April 23, 2003.

O.H. Eaton, Jr., Judge.

Counsel: Steven G. Mason, Steven G. Mason, P.A., Orlando, for Plaintiffs.

Frederick J. Nelson, Orlando, for Defendant Seminole County.

Jeffery Weiss and Debra S. Babb, Orlando, for Defendant City of Casselberry.

1. *FINAL JUDGMENT*

Then entered dancing-girls of ill repute,
Graceful and slim, and girls who peddled fruit,
Harpers and bawds and women selling cake,
Who do their office for the Devil's sake,
To kindle and blow the fire of lechery,
Which is so closely joined with gluttony;
I call on holy writ, now, to witness
That lust is in all wine and drunkenness.

Geoffrey Chaucer
The Pardoner's Tale, 1380 A.D.

The plaintiffs in this action have asked for the court to rule upon the validity of the ordinances passed by Seminole County and the City of Casselberry commonly referred to during this litigation as the "anti nudity ordinances." For the reasons stated herein, the court has determined that the relief requested by the plaintiffs must be denied.

Historically, one of the plaintiffs, Club Juana, began operations in the City of Casselberry as an adult entertainment night club in the late 1960's. At that time, the City of Casselberry and Seminole County had little regulation of the adult entertainment industry. Prior to or subsequent to the opening of the Club Juana, all of the other municipalities in Seminole County passed prohibitory ordinances banning adult entertainment.

A proliferation of these clubs occurred in the environs of the City of Casselberry in the 1990's, possibly as a result of stricter regulation of such establishments in Orange County. By the time these ordinances were being considered there were between five and seven adult entertainment clubs in the City of Casselberry and close by in south Seminole County.

The testimony presented at trial provides insight for the motive for passing these ordinances. One, or even two or three, of these adult entertainment clubs in South Seminole County was tolerable to both the city and the county for many years but the tolerance level decreased as the number of clubs increased. And so, both the city and the county spent enormous amounts of time, energy and effort to pass ordinances that regulate the clubs to the point of discouraging their continued operation.

There are two problems with the approach taken by the city and the county in enacting these ordinances. First, the ordinances were passed *after* the proliferation of the adult clubs rather than *in anticipation* of their proliferation. Second, because the ordinances were not enacted earlier, it was not possible to "grandfather in" the few original establishments and maintain the status quo, thereby minimizing the impact the adult entertainment industry had on the area without disrupting those businesses that were already operating there.

Both the Seminole County ordinance and the City of Casselberry ordinance make legislative findings. The Seminole County ordinance relies upon the desires of the citizens of the County (apparently as a result of a referendum on the ordinance) as well as prior court decisions that approved similar ordinances elsewhere. The City of Casselberry ordinance also relies upon a referendum. And while it relies upon prior court decisions to some extent, the pleadings frame the issue of whether the city's reliance upon other information was reasonable in order to prove that nudity combined with alcohol produces adverse secondary effects. The court was of the opinion that mixed questions of law and fact were presented and declined to enter summary judgment for the defendants. As explained later, had the issue been "better put" the trial of this case may have been avoided.

The Seminole County Public Decency Ordinance is an anti nudity ordinance (with exemptions) and provides as follows:

> Section 5. Nudity, Sexual Conduct Prohibited.
>
> (a) No person shall knowingly, intentionally, or recklessly appear, or cause another person to

appear, nude, as defined in section 3(d), or expose to public view his or her genitals, vulva, penis, pubic area, or buttocks, or any simulation thereof;

(b) No person shall knowingly, intentionally, or recklessly expose, or cause a female person to expose her breasts or any simulation thereof to public view;

(c) No person or entity maintaining, owning or operating a public place shall encourage, allow or permit any person to appear nude or to expose to public view his or her genitals, pubic area, vulva, penis, anus or any portion of the buttocks or simulation thereof. This section shall be violated if any portion of the buttocks is visible from any vantage point.

* * * *

(f) Each female person may determine which 1/4 of her breast surface area (see definition of breast) contiguous to and containing the areola is to be covered;

* * * *

(h) It shall be unlawful for any person to knowingly, intentionally, or recklessly appear, or cause another person to appear, nude, as defined in Section 3(d), in a public place or in any other place which is readily visible to the public; except as provided in Section 6. It shall also be unlawful for any person or entity maintaining, owning, or operating any public place to encourage, suffer or allow any person to appear nude in such public place, except as provided in Section 6.

Section 6. Exemptions. The prohibitions of Section 5 of this Ordinance shall not apply:

* * * *

> (b) when the conduct of being nude cannot legally be prohibited by this Ordinance because: (i) it constitutes a part of a bona fide live communication, demonstration or performance by a person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression and is not a mere guise or pretense utilized to exploit the conduct of being nude for profit or commercial gain (citation omitted), and as such is protected by the United States Constitution or Florida Constitution, or (ii) it is otherwise protected by the United States Constitution or Florida Constitution.

The City of Casselberry Ordinance "is in addition to" the Seminole County ordinance. Also, it prohibits nudity in establishments that serve alcoholic beverages. It provides as follows:

* * * *

> Whereas, the City Commission of the City of Casselberry, Florida, hereby finds and declares that this Ordinance is in addition and supplemental to the Seminole County Public Decency Ordinance and the City of Casselberry Adult Entertainment Code and that this Ordinance in no way whatsoever is intended to conflict with the Seminole County Public Decency Ordinance and the City of Casselberry Adult Entertainment Code; and

> Whereas, the City Commission of the City of Casselberry hereby finds and declares that this Ordinance shall not be construed as opting the City of Casselberry out of the Seminole County Public Decency Ordinance * * * * .
>
> * * * *
>
> It shall be unlawful within the City of Casselberry for any manager, officer, agent, servant, employee, contractor, person in charge, customer or invitee of any premises or bottle club licensed under the laws of the State of Florida to sell or allow the consumption of alcoholic beverages to knowingly, intentionally, or recklessly exhibit, suffer, allow, permit, engage in, participate in, or be connected with nudity upon the licensed premises. The combination of nudity and alcoholic beverages at any premises or bottle club licensed under the laws of the State of Florida to allow the sale or consumption of alcoholic beverages within the City of Casselberry is hereby strictly prohibited.

Thus, since the Casselberry ordinance "is in addition and supplemental to the Seminole County Public Decency Ordinance" and the "[o]rdinance in no way whatsoever is intended to conflict with the Seminole County Public Decency Ordinance and the City of Casselberry Adult Entertainment Code," the two ordinances must be read together when applying them to the Plaintiffs in this case.

There has to be a starting point in determining the validity of these ordinances and as good a starting point as any is a principle of law. Like it or not, nude dancing is protected to some extent by the First Amendment of the United States Constitution. As the United States Supreme

Court stated in *City of Lake Erie v. Pap's A.M.*, 529 U. S. 277, 120 S. Ct. 1382, 146 L.Ed.2d 265 (2000):

> Being "in a state of nudity" is not an inherently expressive condition. As we explained in Barnes, however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection. See Barnes v. Glen Theater, Inc., 501 U.S., at 565-566, 111 S.Ct. 2456 (plurality opinion); Schad v. Mount Ephraim, 452 U.S. 61, 66, 101 S.Ct.. 2176, 68 L.Ed.2d 671 (1981).

Therefore, courts are required to approach these cases with that outer limit in mind.

The governmental interest in combating adverse secondary effects is the justification for these types of ordinances. As stated above, the plaintiffs have attacked the justification by attacking the legislative findings. The attack extends to whether the legislative bodies reasonably relied upon information supplied to them in making the findings. The approach taken by the plaintiffs has met with some success in the past. For instance, it has been held that when a city enacts an ordinance that prohibits persons under the age of twenty-one from entering adult entertainment establishments, it must justify the restriction as being one that furthers government interests by combating adverse secondary effects. *Essence, Inc. v. City of Federal Heights*, 285 F.2d 1272 (10th Cir. 2002).

Interestingly, both Seminole County and the City of Casselberry could have simply relied upon prior studies from other cities or prior court opinions instead of going through the motions of holding referenda and making legislative findings based upon data collected by various

agencies and individuals. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). [Reliance upon an opinion of the Supreme Court of Washington in *Northern Cinema, Inc. v. Seattle*, 585 P.2d 1153 (Wash. 1978), was sufficient to justify enactment of adult entertainment ordinance.] The evidence is convincing that Seminole County mainly relied upon prior court decisions and the findings made in them in enacting its ordinance.

And while the Plaintiffs have attacked both ordinances, the focus has been on the City of Casselberry's ordinance with the lawyers for both defendants meticulously adopting the testimony of each other's witnesses. This focus has been of interest because Section 9 of the county's ordinance provides that the ordinance has "countywide effect in all areas of Seminole County, Florida, unless a City elects to opt out in accordance with the charter." In its ordinance, the City of Casselberry specifically declares that it is not opting out of the County ordinance. So, successfully attacking the city's ordinance will provide little relief for the plaintiffs unless the county's ordinance is also successfully attacked.

Several witnesses were produced who testified about the information available to the city that was relied upon in passing the ordinance. A review of some of the testimony is helpful to understand the issues and the positions of the parties, particularly the City of Casselberry.

Some of the testimony revealed anecdotal, rather than scientific, studies. A Lieutenant from the Seminole County Sheriff's Department testified that he was in charge of an exercise in which a female deputy posed as a prostitute and stood near the intersection of Highway 17-92 and Highway 436 in the city. The intersection of those two

highways is one of the busiest in the State of Florida and is near the location of the Club Juana. Not surprisingly, the female deputy attracted more than passing attention from some of the motorists driving by. Then she moved some distance down Highway 17-92 to the entrance of a residential subdivision and, after an hour, she only attracted the city police, who received a complaint from one of the neighborhood residents about her presence.

It was admitted this exercise was not scientific and the court gives no credibility to it for proof that the Club Juana or any other adult club in the area produces adverse secondary effects. Prostitution, after all, has been around for thousands of years and is not caused by adult clubs any more than it is caused by hotels or internet web sites.

Testimony was also presented that the disc jockey at the Club Juana was arrested for drug trafficking back in 1988 and the City-County Investigative Bureau made street level drug buys in adult clubs and hotels on other occasions. This testimony shows that drugs are readily available in South Seminole County but does not connect their availability to the Club Juana any more than it does to hotels, bars or other establishments not covered by the ordinances in question here, including shopping malls.

The city presented numerous documents as exhibits to prove adverse secondary effects occur as a result of serving nudity with alcohol. These documents include records of service calls made by the police to various locations, crime rate statistics and other information. Taken together, the testimony presented and the evidentiary exhibits submitted suggest, but do not prove, that adult clubs cause adverse secondary effects.

In order to discredit the defendant's evidence, the plaintiffs called Dr. Terry Danner as a witness. He is a criminologist who chairs the Department of Criminal Justice at St. Leo University. He specializes in analyzing the effects crime causes on economic activities. He challenged the theory that nude striptease dancing causes adverse secondary effects whether alcohol is served or not. He opined that "place management" is a "powerful variable" that affects whether or not crime occurs in any given establishment. His testimony casts more doubt upon the findings contained in the City of Casselberry's ordinance and the information the city relied upon and suggests that proper management is the key to successful adult club operations.

But, assuming information relied upon by the city was insufficient to justify passing the ordinance, the inquiry does not end there. If the evidence does not support the rationale used by the city in passing the ordinance, or if the evidence submitted by the plaintiffs disputes that rationale, the burden shifts back to the city to supplement the record with evidence renewing support for a theory that justifies its ordinance. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1778, 152 L.Ed 2d 670 (2002). In order to provide additional support to justify the ordinance, the city presented additional evidence.

William Henry George, Ph.D., a clinical psychologist and associate professor, as well as the Director of Ethnic Studies in the United States, and the Principal Investigator for Research on Alcohol's Effects on Sexual Arousal at the University of Washington, testified as an expert on behalf of the city.

Dr. George has conducted research experiments on alcohol and sexual behavior for over twenty years. He received a Federal grant from the National Institute of Health "to initiate experiments to study the effects of drinking on sexual arousal and sexual risk taking." The grant amounted to $1,800,000.00 over a five-year period. *Transcript*, P. 677. He has received at least 3 other Federal grants. *Transcript*, P. 700.

Boiled down to its basics, Dr. George's "scientific experiments" include the use of volunteer college students of both sexes who were invited to drink alcohol and view erotic material. Sometimes the material was more erotic than others. Sometimes the material was pornographic. While Dr. George did not explain the brand or brands of alcohol he used in the experiments to any great degree, it is apparent that his student volunteers were satisfied because they drank a lot of it. He came to the following findings and "scientific conclusions" as a result of his studies:

1. Finding – Students who were exposed to erotic material drank more than those who were not so exposed.

2. Finding – Students who anticipated that they would get more erotic material drank more than those who did not.

3. Finding – Exposure to erotic materials can make you drink more.

4. Finding – Men see a woman who is drinking as being more sexually available than a woman who is not drinking and, if she is nude, the woman is seen as being even more available.

5. A person who is drunk rather than merely intoxicated may do things he wouldn't ordinarily do, including committing crimes because one of the effects of alcohol taken to excess is to "disinhibit" the person.[1]

6. He could not speculate that in a "dancers versus patrons" situation his findings and conclusions would apply.

Dr. George appears to take himself seriously and honestly believes he has made scientific advancements in the field of human behavior.[2] The Federal Government could have saved a lot of money by referring Dr. George to the *Pardoner's Tale* by Geoffrey Chaucer. What did he and the taxpayers learn that Chaucer did not already know more than 600 years ago? Of course, Dr. George limited his research to the laboratory and not "in the field." One gets the distinct impression after observing the female plaintiffs in this case over a period of several days, that when they are *au naturel* and approach a customer who has been drinking for the purpose of earning money in exchange for dancing, they, and not the customer, are in complete control.

---

[1] This finding does not take into account the fact that individuals who are past age 35, drunk or sober, are generally less likely to commit crimes than persons under 35. Barlow, *Introduction to Criminology*, Fifth Ed., p. 279.

[2] It is disappointing to realize that the Federal Government has wasted the taxpayer's money on this ridiculous research. If Dr. George truly takes himself seriously, then perhaps he should, like the Emperor in the tale by Hans Christian Anderson, check to see if his science is clothing or in his imagination.

Testimony was presented through a number of witnesses that an extensive, and expensive, investigation of illegal activities was conducted at one of the South Seminole County clubs known as Rachael's. There is no question about the illegal activity, nor the extent of the investigation. More than forty hours of "undercover" V.H.S. tapes were introduced into evidence to document it. The owners of the establishment allowed illegal activities to occur and the engines of the criminal justice system went to work as a result. However, the evidence does not establish that nude dancing caused this criminal activity. The causation resulted from the management providing the place and opportunity for it to happen. Prostitution, drug offenses and related vice activities occur in places not covered by these ordinances with some regularity.

The city manager, Jack Schluckebier saved the day for Casselberry. He stated that the city decided to hold workshops when it received a fourth application for an adult establishment. He testified that "Casselberry is distinctive in that it allows performance establishments in commercial areas whereas other cities typically do not." *Transcript*, P. 192-93. He also testified as follows:

> So the city commission was just looking at their possibilities and trying to be advised as to what their chances were to improve regulating the adverse impacts that they were seeing all around them with all of these clubs opening and the concerns that were being expressed to the city's elected representatives by their constituents.

Transcript, P. 185.

> Q: Could you please describe that information that city staff provided to the commission?

A: The first two pages have to do with the staff and the delineation of sexually oriented business, adult entertainment establishment regulations that the county was doing. It was our opinion that the city should do a comparable ordinance but not precisely join with the county at that time.

* * * *

The third item was comparisons of municipalities in Seminole County as to their level of allowance for nudity in their codes, their level of allowance for alcohol mixed with nudity, and similar to that provision on both state law and other statutory basis for the city commission to give consideration to some restrictions on those topics.

Transcript, P. 199-205.

Q: Did the city staff prepare any kind of exhibits discussing a comparison of Casselberry's ordinance versus other cities and the county regarding what they do in their codes regarding adult entertainment?

A: Yes, ma'am. Attached to that communication were three charts. The first one is a comparison of adult entertainment zoning regulations. The second one, a comparison of the nudity regulations for cities in Seminole County and those surrounding Casselberry and Orange County, as well as Seminole County and Orange County. And the third, a comparison of alcohol and nudity regulations, and whether the alcohol and nudity are allowed together. They were trying to determine the community standards elsewhere as compared to Casselberry.

Transcript, P. 206.

> Q: Did the ordinance also set forth the comparison of the Casselberry code to codes of its neighbors?
>
> A: Yes, it did. That was something specifically that kept reoccurring for the commission was this fact that Casselberry was unique in having performance establishments, having so many in southeast Seminole, but not only in the city but adjacent. They wanted to know why when they employed the standard of their neighbors, they determined our standards were lower. And so, that was an issue that was a determined by the commission, that was an issue for them to address.

Transcript, P. 225.

Conforming the City of Casselberry's ordinance regulating nudity to the other surrounding cities is a valid exercise of the city's police power and no further inquiry into the city's motivation need be made. The testimony of Mr. Schluckebier is convincing and it is accepted.

Ordinances regulating nudity in establishments that serve alcohol have been approved by the courts time and time again. *Café 207, Inc. v. St. John's County*, 66 F.3d 272 (11th Cir. 1995); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998); *Ben's Bar v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003). The City of Casselberry's ordinance is no better and no worse than those that have met with prior approval. The ordinance is valid and enforceable.

The attack on Seminole County's ordinance also fails. The county reasonably relied upon prior court decisions and the findings contained in them in drafting the Seminole County Public Decency Ordinance.

The testimony of one final witness needs to be discussed. The plaintiffs called an anthropologist, Dr. Judith Lynn Hannah, as an expert in dance as a nonverbal communication. She traced the history of the striptease and in describing exotic dance stated, "it's adult entertainment and it is supposed to be somewhat naughty and somewhat risque and you're supposed to see more flesh that you would see elsewhere." *Transcript*, Page 357. Since the clothing requirements of the ordinances in question here forbid nudity completely (Dr. Hannah noted that more clothing is required than is seen at swimming pools and on the beaches) she testified that the nature of the striptease is destroyed. That testimony is accepted as true. Since the courts have approved these types of ordinances in the past, the only question remaining is what is left of the "outer ambit of first amendment protection" for nude dancing? Not much, apparently. At least there is still Shakespeare, Wagner, the Internet and nightly television.

IT IS ADJUDGED:

All relief requested by the Plaintiffs is denied and the defendants may go hence, without day, and recover their costs.

* * *

APPENDIX C

7 Fla. L. Weekly Supp. 208a

Municipal corporations – Ordinances – Adult entertainment – Plaintiffs, who performed in theatrical production which included nudity at establishment licensed to sell alcohol, are not entitled to temporary injunction prohibiting city from enforcing ordinance which generally prohibits nudity upon premises licensed to sell alcoholic beverages – Performance fell within exemption contained in county's anti-nudity ordinance because "it constitutes a part of a bona fide live communication, demonstration or performance by a person wherein such nudity is expressive conduct incidental to and necessary for conveyance or communication of a genuine message or public expression and is not a mere guise or pretense utilized to exploit the conduct of being nude for profit or commercial gain"

CHRISTY MCKEE and MARGARET K. MORGAN, Plaintiffs, vs. CITY OF CASSELBERRY, FLORIDA, Defendant.

Circuit Court, 18th Judicial Circuit in and for Seminole County.

Case No. 99-CA-1430-16-E.

December 30, 1999.

O.H. Eaton, Jr., Judge.

Counsel: H. Franklin Robbins, Jr., H. Franklin Robbins, Jr., P.A., Orlando; and Steven G. Mason, Steven G. Mason, P.A., Orlando, for Plaintiffs. Donna L. McIntosh, Stenstrom, McIntosh, Colbert, Whigham & Simmons, P.A., Sanford; and Bradly Roger Bettin, Sr. and Anthony A. Garganese, Amari & Theriac, P.A., Cocoa, for Defendant.

AMENDED

ORDER DENYING TEMPORARY INJUNCTION

The plaintiffs in this case, Christy McKee and Margaret K. Morgan, have moved for a temporary injunction prohibiting the City of Casselberry from enforcing City Ordinance 98-922 which generally prohibits nudity upon premises licensed to sell alcoholic beverages.

The complaint alleges and the evidence presented established that the Plaintiffs performed in a production entitled *Femmes Fatale* which included nudity at the Club Juana, an establishment licensed to sell alcohol. They were subsequently arrested for violation of the ordinance. The criminal charges were filed in the County Court of Seminole County.

In order to understand the issues in this litigation it is necessary to review the ordinances in question and the evidence presented at the hearing on the motion for temporary injunction.

Fair is Foul and Foul is Fair

Both Seminole County and the City of Casselberry have enacted ordinances regulating "adult entertainment" in clubs which feature nude or partially nude dancing. The Seminole County Public Decency Ordinance is an anti-nudity ordinance (with exemptions) and provides as follows:

> "*Section 5. Nudity, Sexual Conduct Prohibited.*
>
> (a) No person shall knowingly, intentionally, or recklessly appear, or cause another person to appear, nude, as defined in section 3(d), or expose to public view his or her genitals, vulva, penis,

pubic area, or buttocks, or any simulation thereof;

(b) No person shall knowingly, intentionally, or recklessly expose, or cause a female person to expose her breasts or any simulation thereof to public view;

(c) No person or entity maintaining, owning or operation [sic] a public place shall encourage, allow or permit any person to appear nude or to expose to public view his or her genitals, pubic area, vulva, penis, anus or any portion of the buttocks or simulation thereof. This section shall be violated if any portion of the buttocks is visible from any vantage point.

* * * *

(f) Each female person may determine which 1/4 of her breast surface area (see definition of breast) contiguous to and containing the areola is to be covered;[1]

* * * *

(h) It shall be unlawful for any person to knowingly, intentionally, or recklessly appear, or cause another person to appear, nude, as defined in Section 3(d), in a public place or in any other place which is readily visible to the public, except as provided in Section 6. It shall also be unlawful for any person or entity maintaining, owning, or operating any public place to encourage, suffer or

---

[1] This exemption is apparently for ladies of fashion who wear low cut dresses at cocktail parties both in Seminole County and in the City of Casselberry. They should remember that the exposure limit is 25% and no more. A caliper may be necessary in close cases.

allow any person to appear nude in such public place, except as provided in Section 6.

Section 6. Exemptions. The prohibitions of Section 5 of this Ordinance shall not apply:

* * * *

(b) When the conduct of being nude can not legally be prohibited by this Ordinance because: (i) it constitutes a part of a bona fide live communication, demonstration or performance by a person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression and is not a mere guise or pretense utilized to exploit the conduct of being nude for profit or commercial gain (citation omitted), and as such is protected by the United States Constitution or Florida Constitution, or (ii) it is otherwise protected by the United States Constitution or Florida Constitution."

Unlike Seminole County, the City of Casselberry does not find nudity to be offensive. It fears "disturbances associated with mixing alcohol and nudity" in public places. The City of Casselberry Ordinance provides as follows:

* * * *

"Whereas, the City Commission of the City of Casselberry, Florida, hereby finds and declares that this Ordinance is in addition and supplemental to the Seminole County Public Decency Ordinance and the City of Casselberry Adult Entertainment Code and that this Ordinance in no way whatsoever is intended to conflict with the Seminole County Public Decency Ordinance and the City of Casselberry Adult Entertainment Code; and

> Whereas, the City Commission of the City of Casselberry hereby finds and declares that this Ordinance shall not be construed as opting the City of Casselberry out of the Seminole County Public Decency Ordinance * * * * .
>
> * * * *
>
> It shall be unlawful within the City of Casselberry for any manager, officer, agent, servant, employee, contractor, person in charge, customer or invitee of any premises or bottle club licensed under the laws of the State of Florida to sell or allow the consumption of alcoholic beverages to knowingly, intentionally, or recklessly exhibit, suffer, allow, permit, engage in, participate in, or be connected with nudity upon the licensed premises. The combination of nudity and alcoholic beverages at any premises or bottle club licensed under the laws of the State of Florida to allow the sale or consumption of alcoholic beverages within the City of Casselberry is hereby strictly prohibited."

Since the City of Casselberry ordinance "is in addition to and supplemental to the Seminole County Public Decency Ordinance" and since the City of Casselberry ordinance "in no way whatsoever is intended to conflict with the Seminole County Public Decency Ordinance," it is apparent that the constitutional exemption contained in the Seminole County Public Decency Ordinance was intended not to conflict with the City of Casselberry ordinance. That being the case, the ordinances, when read together, do not prohibit alcoholic beverages from being sold when nudity "constitutes a part of a bona fide live communication, demonstration or performance by a person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message

or public expression and is not a mere guise or pretense utilized to exploit the conduct of being nude for profit or commercial gain (citation omitted), and as such is protected by the United States Constitution or Florida Constitution, or (ii) it is otherwise protected by the United States Constitution or Florida Constitution."

The question thus presented is whether the performance of *Femes Fatale* violated the City of Casselberry ordinance or fell within the exemption stated in the Seminole County Public Decency Ordinance.[2]

Round about the caldron go;

In the poison'd entrails throw.

Doubtless seeking to come within the exemption contained within the ordinances, the Plaintiffs were recruited by the owner of the Club Juana to perform in the production of *Femmes Fatale.* Morris Sullivan, a free lance writer with an M.B.A. degree who has been in theater in Central Florida for over ten years, was hired to write the script and produce and direct the performance.

Mr. Sullivan testified that he wrote a series of vignettes, including the much publicized "Witches Scene" from Act 4, Scene 1 of Shakespeare's *McBeth,* which were designed through the use of political parody and satire to state a protest to the county and city ordinances. While nudity played a part in all of the vignettes, it was an integral part of the performance and necessary to carry the message of

---

[2] One wonders if the Casselberry Ordinance were enacted by the City of Orlando if the patrons of the Orlando Opera Company would feel protected from indecency by being denied the opportunity to sip champagne between the acts of, say, Wagner's *Das Rhinegold?*

protest. Mr. Sullivan reminded the court that nudity has been a part of theater for centuries and provided several modern examples such as *Oh Calcutta!, Angels in America* (which won a Pulitzer Prize) and *The Grapes of Wrath.*

Mr. Sullivan, Ms. McKee and Ms. Morgan testified that there were a series of rehearsals prior to the performance and the script, which is in evidence, had to be memorized.

Mr. Sullivan testified that his production of *Femes Fatale* was valid theater. This testimony was not seriously challenged by the defendant and the court accepts it as being true. He was present during the thirty five minute performance and estimated that there was nudity about 25% of the time.[3]

Double, double, toil and trouble;

Fire burn and caldron bubble.

On the night of the performance of *Femes Fatale, law* enforcement agents were present and filmed the production. The film is in evidence and the court has viewed it.[4] Broadway quality it is not. But the performance is not "adult entertainment" (nude dancing) as much as it is "entertainment for adults." While reasonable persons may disagree with the quality of the performance, it contains the elements Mr. Sullivan testified it contained – political parody and satire – elements which are in the best of American traditions. Americans have been free to jab and poke fun at their government ever since King George was ousted from our shores and they must continue to be free

[3] Ms. Morgan testified that the performance was more like forty five minutes – but she wasn't sure since she wasn't wearing a watch.

[4] The court will not divulge how many times.

to do so, even at the Club Juana. The performance falls within the exemption contained in the County Ordinance because "it constitutes a part of a bona fide live communication, demonstration or performance by a person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression and is not a mere guise or pretense utilized to exploit the conduct of being nude for profit or commercial gain."

Out, out, damned spot!

Since the performance of *Femes Fatale* fits within the exemption of the Seminole County Public Decency Ordinance and the Casselberry ordinance must be construed not to conflict with it, the only other issue that needs to be addressed is whether the plaintiffs are entitled to a temporary injunction. The court concludes that they are not.

The plaintiffs have their remedy in the Seminole County Court to challenge the charges pending against them and, if they lose, the right to appeal the decision. They also have a civil remedy for damages if they were wrongfully charged with a crime. Further, it is not possible for this court to prejudge the future conduct of the plaintiffs if they repeat the performance of *Femes Fatale* or any other production. Accordingly, it would be counter productive to enjoin the City of Casselberry from enforcing the ordinance against future constitutionally protected activities.

Finally, all those who will disagree with the court's findings and conclusions should recall the days of the Great Depression when the federal government hired commercial artists to provide paintings and sculptures for public buildings. These artists wrote a ditty that is sung to the

tune of "My Bonnie Lies Over the Ocean" which is fully set forth as follows:

We rise up so early each morning,

All eager to start up the day.

We get out our paints and our brushes,

And work for the WPA.

(Refrain)

All for art,

All for art.

That's why we do what we do,

We do.

All for art,

All for art,

When you work for the red, white, and blue.

We're trying to paint on the pittance

They pay in the WPA.

The fruit we'll be eatin' tomorrow,

Is the still life we're painting today.

(Refrain)

And so we exist on per diems,

Each masterpiece comes from the heart.

They may never hang in museums,

But who is to say they ain't art.

(Refrain)

IT IS ADJUDGED:

The Plaintiffs' Motion for Temporary Injunction is denied.

* * *

APPENDIX D

PAULINE KOZIARA AND KATHLEEN DERIENZO, Appellant, v. SEMINOLE COUNTY, FLORIDA, Appellee.

CASE NO. 5D03-1743

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

2004 Fla. App. LEXIS 7797

May 7, 2004, Decided

NOTICE:

DECISION WITHOUT PUBLISHED OPINION

SUBSEQUENT HISTORY: Released for Publication May 26, 2004.

PRIOR HISTORY: *Koziara v. Seminole County*, 2004 Fla. App. LEXIS 4682 (Fla. Dist. Ct. App. 5th Dist., Mar. 30, 2004)

OPINION:

REHEARING DENIED.

APPENDIX E

PART 2. SEMINOLE COUNTY PUBLIC DECENCY ORDINANCE*

***Editor's note:** The Seminole County Public Decency Ordinance was initiated by the Seminole County electorate pursuant to Section 2.2(H) of the Seminole County Home Rule Charter. After a majority of the electorate voted in favor of the enactment of the ordinance at the November, 1998 general election, the Board of County Commissioners on November 10, 1998, by Resolution No. 98-R-247, declared the ordinance enacted.

Sec. 46.201. Recitals, Ordinance Number 98-49.

WHEREAS, local governments may, by virtue of the Twenty-First Amendment to the United States Constitution, regulate and prohibit various forms of actual and simulated nude and sexual conduct, and the depiction thereof, see California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed. 2d 342, rehearing denied, 410 U.S. 948, 93 S.Ct. 1351 (1972); and New York State Liquor Authority v. Bellanca, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed. 2d 357 (1981); and

WHEREAS, local governments may prohibit the exposure of certain body parts, see Geaneas v. Willets, 911 F.2d 579 (11th Cir. 1990), certiorari denied, 499 U.S. 955, 111 S.Ct. 1431, 113 L.Ed. 2d 484 (1991); and

WHEREAS, efforts by the State and Federal governments to apply Florida criminal statutes have been rejected by the courts because, under certain of Florida's

criminal laws, nudity alone cannot be prosecuted without proof of lewd and lascivious conduct; and

WHEREAS, local governments for other counties have successfully passed and defended regulations relating to public nudity; and

WHEREAS, the citizens of Seminole County wish to regulate nudity and sexual conduct, and the citizens of Seminole County believe that nudity and sexual conduct begets undesirable behavior, and that adverse secondary effects such as, but not limited to, prostitution, attempted rape, rape, and assault may occur and have the potential for occurring where nude and sexual conduct is permitted; and

WHEREAS, the citizens of Seminole County wish to protect against similar conditions to the end that they not occur in Seminole County; and

WHEREAS, the citizens of Seminole County desire to prohibit the public display of nudity and sexual behavior or the simulation thereof; and

WHEREAS, the citizens of Seminole County believe that there are increasing incidents of nudity in public places and in other places readily visible to the public; and

WHEREAS, the citizens of Seminole County believe that persons who choose to appear nude in public places are engaging in conduct which often serves to impose their nudity on others who did not seek it out, who are not able to reasonably avoid observing it, and who may be offended or distressed thereby; and

WHEREAS, appearing nude in public places was a criminal offense at common law and was considered an act

malum en se (a wrong in itself) and appearing nude in a public place which is not a public place provided or set apart for nudity has been considered improper see Moffett v. State, 340 So.2d 1155, 1156 n.3 (Fla. 1977); and

WHEREAS, the citizens of Seminole County desire to protect and preserve the wholesome character of Seminole County as a family oriented community with a high quality of life offered for families, tourists and businesses; and

WHEREAS, the citizens of Seminole County believe that appearing nude in public places is still contrary to the general societal disapproval that the people of Seminole County have of persons appearing nude among strangers in public places; and

WHEREAS, the citizens of Seminole County believe that the appearance of persons in the nude in public places generally increases adverse secondary effects such as, but not limited to, incidents of prostitution, sexual assaults and batteries, attracts other criminal activity to the community, and encourages degradation of women and other activities which break down societal and family structures; and

WHEREAS, the citizens of Seminole County believe that without regulation, public nudity constitutes harmful conduct and occurs in a manner which is incompatible with the normal primary activity of a particular place at a particular time; and

WHEREAS, the citizens of Seminole County's sole intent in enacting this Ordinance is to prohibit the conduct of being nude in public places and to suppress the adverse secondary effects such nudity generates; and

WHEREAS, a requirement that exotic dancers don opaque covering sufficient to cover the genitals, buttocks and the breasts, as such portions of the human anatomy are defined in this Ordinance, does not deprive a dance of whatever erotic message, if any, it may convey, but simply makes such message, if any, slightly less graphic and imposes only an incidental limitation, if any, on the message; and

WHEREAS, it is the intent of the citizens of Seminole County to protect and preserve the good order, public health, safety, welfare and morals of Seminole County by restricting, to the fullest extent allowed by the United States Constitution and Florida Constitution, the act of being nude in places which are not readily visible to the public; and

WHEREAS, the citizens of Seminole County believe that Seminole County is a county that is, and desires very much to continue to be, a community that contains and is known for traditional and wholesome public recreational activities, natural features and resources, and historic facilities; and

WHEREAS, the citizens of Seminole County believe that the average person applying contemporary Seminole County community standards would find that the public nudity prohibited by this Ordinance, if allowed, when taken as a whole: (i) appeals to the prurient interests, and (ii) lacks serious literary, artistic, political, and scientific value; and

WHEREAS, the citizens of Seminole County believe that nonregulation of persons appearing nude in public places within Seminole County encourages persons and entities to advertise outside of Seminole County and the

State of Florida by billboard, radio, print and other media the availability of nudity in public places within Seminole County and thus encourages the influx into Seminole County of persons seeking: (i) to observe and/or participate in such nudity, and (ii) to participate in the disorderly, harmful, and illegal conduct that is associated therewith, thereby increasing injuries and damages to the citizens of Seminole County who will be victims of such increased disorderly, harmful, and unlawful conduct and thereby working directly against Seminole County's economic development and tourism development activities; and

WHEREAS, the citizens of Seminole County believe that commercial advertising and/or exploitation of nudity encourages escalation of nude and lewd conduct within the competing commercial establishments exploiting such conduct and thereby increases the adverse effects upon public order and the public health; and

WHEREAS, the citizens of Seminole County believe that the commercial exploitation of women as exotic dancers and/or exploitation of any gender's nudity encourages escalation of nude and lewd conduct within the competing commercial establishments exploiting such conduct and thereby increases the adverse effects upon public order and the public health; and

WHEREAS, the citizens of Seminole County believe that the prohibitions contained herein are the most reasonable and minimal restrictions required so as to regulate conduct which is adverse to public order, health, safety, morality, and decency within Seminole County when such conduct takes place at locations where the public is present or is likely to be present, or where such conduct would be readily visible to the public; and

WHEREAS, the citizens of Seminole County believe that the passage of this Ordinance is necessary to preserve the basic character of Seminole County; and

WHEREAS, States may regulate the conduct of appearing nude in public places, see Michael Barnes v. Glen Theater, Inc. 501 U.S. 560, 111 S.Ct. 2456 115 L.Ed. 2d 504 (1991) and Café 207, Inc. v. St. Johns County, 856 F. Supp. 641 (M.D. Fla. 1994), aff'd, 989 F.2d 1136 (11th Cir. 1995); and

WHEREAS, the citizens of Seminole County are not hereby prohibiting nudity in private places or prohibiting nudity which is protected by the United States Constitution or Florida Constitution; and

WHEREAS, the citizens of Seminole County believe that the express exemptions contained in this Ordinance provide adequate protection to persons who, without such express exemptions, might otherwise be prevented or discouraged by this Ordinance from exercising constitutionally protected rights; and

WHEREAS, this Ordinance is intended to regulate conduct, not speech; and

WHEREAS, this Ordinance is a general ordinance regulating conduct and is not an ordinance that affects the use of land as contemplated by Section 125.66, Florida Statutes; and

WHEREAS, an Economic Impact Statement has been prepared and made available in accordance with the requirements of the Seminole County Home Rule Charter,

(Whereas, Ord. No. 98-49, 11-10-98)

Sec. 46.202. Title.

This Part shall be known as the "Seminole County Public Decency Ordinance". (Ord. No. 98-49, § 1, 11-10-98)

Sec. 46.203. Intent.

(a) It is the intent of this Part to protect and preserve the good order, health, safety, welfare, and morals of the citizens of Seminole County by prohibiting a person from intentionally or recklessly appearing or being nude, or causing another person to appear or be nude, in a public place and in other places which may reasonably be expected to be observed by the public within Seminole County.

(b) It is the further intention of this Part to accomplish those intents and purposes expressed in the recitals ("Whereas" clauses) of this Part, each of which are incorporated by reference into this Section.

(Ord. No. 98-49, § 2, 11-10-98)

Sec. 46.204. Definitions.

When used in this Part, the following terms shall have the following meanings:

Breast. A portion of the human female mammary gland (commonly referred to as the female breast) including the nipple and the areola (the darker colored area of the breast surrounding the nipple) and an outside area of such gland wherein such outside area is: (i) reasonably compact and contiguous to the areola, and (ii) contains at

least the nipple and the areola and one-fourth of the outside surface area of such gland.

Buttocks. (For a short general description see the last sentence of this subsection.) The area at the rear of the human body (sometimes referred to as the gluteus maximus) which lies between two imaginary straight lines running parallel to the ground when a person is standing, the first or top such line being one-half inch below the top of the vertical cleavage of the nates (i.e., the prominence formed by the muscles running from the back of the hip to the back of the leg) and the second or bottom such line being one-half inch above the lowest point of the curvature of the fleshy protuberance (sometimes referred to as the gluteal fold), and between two imaginary straight lines, one on each side of the body (the "outside lines"), which outside lines are perpendicular to the ground and to the horizontal lines described above and which perpendicular outside lines pass through the outermost point(s) at which each nate meets the other side of each leg. Notwithstanding the above, buttocks shall not include the leg, the hamstring muscle below the gluteal fold, the tensor fasciae latae muscle or any of the above-described portion of the human body that is between either: (i) the left inside perpendicular line and the left outside perpendicular line, or (ii) the right inside perpendicular line and the right outside perpendicular line. For the purpose of the previous sentence the left inside perpendicular line shall be an imaginary straight line on the left side of the anus: (i) that is perpendicular to the ground and to the horizontal lines described above, (ii) that is one-third of the distance from the anus to the left outside line, and the right inside perpendicular line shall be an imaginary straight line on the right side of the anus (i) that is perpendicular to the

ground and to the horizontal lines described above, and (ii) that is one-third of the distance from the anus to the right outside line. (The above description can generally be described as covering one-third of the buttocks centered over the cleavage for the length of the cleavage.)

Entity. Any proprietorship, partnership, corporation, association, business trust, joint venture, joint-stock company or other for profit and/or not for profit organization.

Nude. Any person insufficiently clothed in any manner so that any of the following body parts are not entirely covered with a fully opaque covering:

(1) The male or female genitals, or

(2) The pubic area, or

(3) The vulva, or

(4) The penis, or

(5) The female breast (each female person may determine which one-quarter of her breast surface area (see definition of breast) contiguous to and containing the nipple and the areola is to be covered), or

(6) The anus, or

(7) The anal cleft, or

(8) The anal cleavage, or

(9) The buttocks. Attire which is insufficient to comply with this requirement includes, but is not limited to, G-Strings, T-Backs, dental floss and thongs.

(10) For the purposes of this subsection, body paint, body dyes, tattoos, liquid latex whether wet or dried, string and dental floss and similar substances shall not be considered "opaque covering".

Person. Any live human being aged ten years of age or older.

Places Provided Or Set Apart For Nudity. Enclosed single sex public restrooms, enclosed single sex functional shower, single sex locker and/or dressing room facilities, enclosed motel rooms and hotel rooms designed and intended for sleeping accommodations, doctor's offices, portions of hospitals, the yard area of residences and similar places in which nudity or exposure is necessarily and customarily expected outside of the home and the sphere of privacy constitutionally protected therein. This term shall not be deemed to include places where a person's conduct of being nude is used for his or her profit or where being nude is used for the promotion of business or is otherwise for commercial gain.

Public Place. Any location frequented by the public, or where the public is present or likely to be present, or where a person may reasonably be expected to be observed by members of the public. Public places include, but are not limited to, streets, sidewalks, parks, beaches, business and commercial establishments (whether for profit or not for profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement or membership fee), bottle clubs, hotels, motels, restaurants, night clubs, country clubs, cabarets, and meeting facilities utilized by any religious, social, fraternal or similar organization. Premises, or portions thereof such as hotel rooms, used solely as a private

residence, whether permanent or temporary in nature shall not be deemed to be a public place.

(Ord. No. 98-49, § 3, 11-10-98)

Sec. 46.205. Findings.

In addition and supplemental to the findings and determinations contained in the recitals ("Whereas" clauses) of this Part which are incorporated by reference into this Section, it is the intent of the citizens of Seminole County to regulate the conduct of appearing nude in public places for the purpose of regulating nudity and other conduct, that considering what has happened in other communities, the acts prohibited in Section 46.206 hereinbelow encourage or create the potential for the conduct of adverse secondary effects such as, but not limited to, prostitution, attempted rape, rape, and assault; that actual and simulated nudity and sexual conduct in public places, begets and has the potential for begetting undesirable and unlawful behavior; that sexual, lewd lascivious, and salacious conduct results in violation of law and creates dangers to the health, safety, morals, and welfare of the public and those who engage in such conduct; and, it is the intent of Section 46.206 of this Part to specifically prohibit nudity, gross sexuality and the simulation thereof.

(Ord. No. 98-49, § 4, 11-10-98)

Sec. 46.206. Nudity, sexual conduct prohibited.

(a) No person shall knowingly, intentionally or recklessly appear, or cause another person to appear, nude, as defined in Section 46.204(d), or expose to public view his or her genitals, vulva,

penis, pubic area, or buttocks, or any simulation thereof;

(b) No person shall knowingly, intentionally or recklessly expose, or cause a female person to expose her breasts or any simulation thereof to public view;

(c) No person or entity maintaining, owning, or operating a public place shall encourage, allow or permit any person to appear nude or to expose to public view his or her genitals, pubic area, vulva, penis, anus, or any portion of the buttocks or simulation thereof. This Section shall be violated if any portion of the buttocks is visible from any vantage point;

(d) No person shall engage in and no person or entity maintaining, owning, or operating a public place shall encourage, allow or permit any sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, lap dancing, straddle dancing, any sexual act which is prohibited by law, touching, caressing, or fondling of the breasts, buttocks, anus, or genitals, or the simulation thereof;

(e) The prohibitions of this Section shall not apply when a person appears nude in a place provided or set apart for nudity provided: (i) such person is nude for the sole purpose of performing the legal function(s) that is customarily intended to be performed within such place provided or set apart for nudity, and (ii) such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity;

(f) Each female person may determine which one-fourth of her breast surface area (see

definition of breast) contiguous to and containing the areola is to be covered; and

(g) This Section shall not be deemed to address photographs, movies, video presentations, or other non live performances.

(h) It shall be unlawful for any person to knowingly, intentionally, or recklessly appear, or cause another person to appear, nude, as defined in Section 46.204(d), in a public place or in any other place which is readily visible to the public, except as provided in Section 46.207. It shall also be unlawful for any person or entity maintaining, owning, or operating any public place to encourage, suffer or allow any person to appear nude in such public place, except as provided in Section 46.207.

(Ord. No. 98-49, § 5, 11-10-98)

Sec. 46.207. Exemptions.

The prohibitions of Section 46.206 of this Part shall not apply:

(a) When a person appears nude in a place provided or set apart for nudity, as defined by this Part, provided: (i) such person is nude for the sole purpose of performing the legal function(s) that is/are customarily intended to be performed within such place provided or set apart for nudity, and (ii) such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity.

(b) When the conduct of being nude can not legally be prohibited by this Part because: (i) it

constitutes a part of a bona fide live communication, demonstration or performance by a person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression and is not a mere guise or pretense utilized to exploit the conduct of being nude for profit or commercial gain (see for instance Board of County Commissioners v. Dexterhouse, 348 So. 2d 916 (Fla. 2nd DCA 1977)), and as such is protected by the United States Constitution or Florida Constitution, or (ii) it is otherwise protected by the United States Constitution or Florida Constitution.

(c) A mother's breastfeeding of her baby does not under any circumstance violate the provisions of this Part.

(Ord. No. 98-49, § 6, 11-10-98)

Sec. 46.208. Enforcement and penalties.

Any person or entity violating any of the provisions of this Part shall be prosecuted in the same manner as misdemeanors are prosecuted. Such violations shall be prosecuted in the name of the State of Florida in a court having jurisdiction of misdemeanors by the prosecuting attorney thereof and, upon conviction, shall be punished by a fine not to exceed $500.00 or by imprisonment in the County jail not to exceed 60 days or by both such fine and imprisonment as provided in Section 125.69, Florida Statutes, or its successor. Each incident or separate occurrence of an act that violates this Part shall be deemed a separate offense.

(Ord. No. 98-49, § 7, 11-10-98)

Sec. 46.209. Injunctive relief.

In addition to the procedures provided herein, persons and entities that are not in conformity with these requirements shall be subject to appropriate civil action in the court of appropriate jurisdiction for abatement.

(Ord. No. 98-49, § 8, 11-10-98)

Sec. 46.210. Area of effectiveness

In accordance with the provisions of Article VIII, Section (1)(g), Constitution of the State of Florida, this Part shall have Countywide effect in all areas of Seminole County, Florida unless a City elects to opt out in accordance with the Charter.

(Ord. No. 98-49, § 9, 11-10-98)

Sec. 46.211. Severability.

If any section, subsection, sentence, clause, phrase, word or provision of this Part is for any reason held invalid or unconstitutional by any court of competent jurisdiction, whether for substantive, procedural, or any other reason, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions of this Part.

(Ord. No. 98-49, § 10, 11-10-98)

Sec. 46.212. Inclusion in the Code.

It is the intention of the Board and it is hereby provided that the provisions of this Ordinance shall be made a part of the Seminole County Code; that the sections of this Ordinance may be renumbered or relettered to accomplish such intention; and that the word "Ordinance" may be changed to "Section," "Article," or other appropriate designation.

(Ord. No. 98-49, § 11, 11-10-98)

Sec. 46.213. Effective date.

This Ordinance shall become effective immediately upon the filing of a certified copy of this Ordinance with the Department of State by the Clerk of the Board of County Commissioners.

APPENDIX F

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

PAULINE KOZIARA, and
KATHLEEN DeRIENZO,

Appellants, CASE NO.: 5D03-1743

v.

SEMINOLE COUNTY, FLORIDA,

Appellee.

_____/

APPELLANTS' MOTION FOR CLARIFICATION, REHEARING AND REHEARING EN BANC

TO: HONORABLE ROBERT J. PLEUS, JR.
HONORABLE RICHARD B. ORFINGER
HONORABLE WILLIAM D. PALMER
FIFTH DISTRICT COURT OF APPEAL
300 SOUTH BEACH STREET
DAYTONA BEACH, FLORIDA 32114

The Appellants, **PAULINE KOZIARA** and **KATHLEEN DeRIENZO**, pursuant to Rules 9.330 and 9.331, Fla.R.App.P., request that the court clarify, rehear, or grant rehearing en banc in this case. As grounds, the Appellants state as follows:

1. On March 30, 2004, the panel entered a per curium affirmance citing *Cafe 207, Inc. v. St. Johns County*, 66 F.3d 272 (11th Cir. 1995).

2. The citation to *Cafe 207* is confusing because, from a procedural standpoint, *Cafe 207* has no application to the trial court decision here. *Cafe 207* did not involve a

trial on the merits addressing the government's rationale for passing its ordinance. Further, and perhaps of greater significance, the Eleventh Circuit recently receded from same.

> The County argues that Cafe 207, Inc. v. St. Johns County, 66 F.3d 272 (11th Cir. 1995), which affirmed and adopted the reasoning of a trial court judgment validating a similar ordinance, requires us to uphold Ordinance 99-18. [citation omitted]. However, Cafe 207 was decided before Pap's A.M., where the Supreme Court clarified for the first time that nudity ordinances must leave ample capacity for erotic dancers to convey their erotic message, and Alameda Books, in which **Justice Kennedy's controlling opinion** emphasized that secondary effects ordinances must accomplish their goal of combating secondary effects "while leaving the quantity and accessibility of speech substantially, intact."

Peek-A-Boo Lounge v. Manatee County, 337 F.3d 1251, 1274, n. 23 (11th Cir. 2003) (emphasis added).

The Eleventh Circuit further distanced itself from *Cafe 207* – telegraphing that bathing suit ordinances are constitutionally suspect.

> The question we face is whether the county's prohibition, which presumably impacts the expressive component of erotic dancing, is no greater than essential to further the county's interest in preventing secondary effects. In *Pap's A.M.*, the court determined that this issue required the balancing of competing interests, and it concluded that a pasties and G-string requirement survived intermediate scrutiny because it

> "leaves ample capacity to convey the dancers' erotic message."
>
> * * *
>
> Nevertheless, we find it difficult to conclude on this record that preventing erotic dancers from wearing G-strings, thongs, pasties and the like has only a "de minimis" effect on the expressive component of erotic dancing or "leaves ample capacity to convey the dancers' erotic message" *Id.* On the contrary, because erotic dancers in Manatee County are not "free to perform wearing pasties and G-strings," *Id.*, arguably, the county's prohibition could significantly impact that message.

Peek-A-Boo Lounge at 1273-1274.

3. The panel's reliance upon *Cafe 207* is even more unbalanced considering that the appellants presented unrebutted expert testimony that "bathing suits" destroy the nature of striptease, and this testimony was accepted by the trial judge as "true."

> The plaintiffs called an anthropologist, Dr. Judith Lynn Hannah, as an expert in dance as a nonverbal communication. She traced the history of the striptease and in describing exotic dance stated, "it's adult entertainment and it's supposed to be somewhat naughty and somewhat risqué and you're supposed to see more flesh than you would see elsewhere. Transcript, page 357. Since the clothing requirements of the ordinances in question here forbid nudity completely (Dr. Hannah noted that more clothing is required than is seen at swimming pools and on the beaches) she testified that the nature of the

> striptease is destroyed. **That testimony is accepted as true.**

McKee v. Casselberry, 10 Fla.L.Weekly Supp 408a (Fla. 18th Jud. Cir. 2003).

4. The panel decision also conflicts with *City of Los Angeles v. Alameda Books*, 533 US 425 (2002) and *City of Erie v. Pap's A.M.*, 529 US 277 (2000). In *Alameda*, the Supreme Court articulated the process by which a secondary effects challenge (the so-called substantial governmental interest at stake) can be levied against an adult-use ordinance. Here, the trial judge found that as a matter of fact the city and county's evidence was not credible and instead accepted the testimony of the appellants' experts. Once the court made these findings, under Alameda Books, it was incumbent upon it to invalidate these ordinances. A general consideration of the court's evaluation of the evidence supports this assertion.

> It was admitted this exercise was not scientific and the court gives no credibility to it for proof that the Club Juana or any other adult club in the area produces adverse secondary effects.
>
> * * *
>
> In order to discredit the defendant's evidence, the plaintiffs called Dr. Terry Danner as a witness. He is a criminologist who chairs the Department of Criminal Justice at St. Leo University.
>
> * * *
>
> His testimony casts more doubt upon the findings contained in the City of Casselberry's ordinance and the information the city relied upon . . .

McKee, 10 Fla.L.Weekly Supp. 408a (Fla. 18th Jud. Cir. 2003).

Now consider how the trial judge viewed the testimony of the government's expert.

> It is disappointing to realize that the federal government has wasted the tax payers' money on this ridiculous research. If Dr. George truly takes himself seriously, then perhaps he should, like the Emperor in the tale by Hans Christian Anderson, check to see if his science is clothing or in his imagination.

McKee v. Casselberry, 10 Fla.L.Weekly Supp. 408a (Fla. 18th Jud. Cir. 2003).

5. The trial judge upheld the ordinances because he found that as a matter of law, if other cities banned nudity in adult nightclubs, Casselberry and Seminole County could follow suit. Then, as an afterthought, he found that the preamble to Seminole County's ordinance was sufficient to uphold its ordinance – despite the fact that the evidence mounted by the appellants cast doubt upon the city's and county's evidence – as manifested by the court's findings of facts. Thus, the legal conclusions of the trial court and this panel are in sound conflict with established law.

> **This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance.** If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standards set forth in *Renton*.

> (Citation omitted). If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to support the record with evidence renewing support for a theory that justifies its ordinance.

City of Los Angeles v. Alameda Books, 535 US 425, 438-439 (2002).

6. Finally, a word about the use of the "PCA" in this case. The standard for the issuance of a PCA has been stated and restated many times.

> This is not the first time it has been urged upon us that a written opinion was needed after we had affirmed the trial court, per curium, without opinion. Neither do I think this will be the last time, . . .
>
> * * *
>
> As far back as 1928, the Florida Supreme Court noted that when the points of law on which an appeal is predicated are well settled and a discussion of them would serve no useful purpose the decision below would be affirmed without opinion.

Williams v. State, 425 So.2d 1163-1164 (Fla. 5th DCA 1983) [Chief Judge Orfinger concurring].

This attorney cannot state with enough force that the issuance of a PCA in this case is inappropriate. It does not meet the standard – there is no Florida case which governs the court's decision in this case. Thus, the citation to *Cafe 207,* which has been receded from by the Eleventh

Circuit in *Peek-A-Boo*, does not justify a "PCA."[1] Therefore, this court should clarify and explain why it is affirming this case.

Extremely important constitutional issues were presented in these appeals, as reflected by the fact that there was a six day trial, the trial judge entered a lengthy opinion (which is clearly erroneous as a matter of law), Seminole County and the plaintiffs exceeded the page limits in their briefs and a fair amount of the court's and the parties' time was taken up in oral argument. As Judge Cowart explained, a PCA adds nothing to the discussion and in fact dilutes and perhaps renders the entire exercise meaningless.

> This is not a case which should be decided by a PCA. While that may dispose of the court's problem in this particular case, the issue will not go away and, in the interest of the public, it should be **openly and courageously addressed**.

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[1] Judge Mills was correct when he stated that due to the hardship imposed upon litigants, he would no longer issue a PCA in cases assigned to him.

> For the information and benefit of the attorneys and their clients, I shall not render a per curium affirmed opinion hereafter.
>
> First, I shall sign all opinions in cases assigned to me for primary responsibility.
>
> Second, I shall write a short opinion in each case assigned to me and shall tersely give the reason for affirming each issue raised by the appellant or cross appellant.
>
> I hope that this action by me will answer the frequent complaints about per curium affirmed decisions. The attorneys and their clients will generally know why their cases are affirmed. The possible remedies from adverse decisions will be preserved for consideration by the Supreme Court.

Davis v. Sun Banks of Orlando, 412 So.2d 937 (Fla. 1st DCA 1982).

In the Interest of C.N.G., 531 So.2d 345, 347 (Fla. 5th DCA 1988) [J. Cowart dissenting].

7. Counsel would request that the entire court hear this case because it is a matter of great public importance. See Rule 9.330.[2]

> I express a belief, based upon a reasoned and studied professional judgment, that the panel decision and this case is of exceptional importance.
>
> Respectfully submitted this 9th day of April, 2004.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail this 9th day of April, 2004, to **Frederick J. Nelson, Esquire**, American Liberties Institute, PO Box 547503, Orlando, FL 32854-7503; with the original to the Clerk of Court, **Frank Habershaw**, District Court of Appeal of the State of Florida, Fifth District, 300 South Beach Street, Daytona Beach, Florida 32114.

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[2] As the court is aware, a request for rehearing is a prerequisite for requesting rehearing en banc.